FILED
SEP 23 1980
MICHAEL RODAK, JR., CLERK

No. 80-219

In the Supreme Court of the United States

OCTOBER TERM, 1979

BIG BEAR SUPERMARKETS NO. 3, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

DAVID A. FLEISCHER
Attorney
National Labor Relations Board
Washington, D.C. 20570

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 80-219

BIG BEAR SUPERMARKETS NO. 3, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that the purported franchisee of one of petitioner's stores was petitioner's alter ego and that therefore they constituted a single employer bound by petitioner's collective bargaining agreements covering that store.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 5

Conclusion 9

TABLE OF AUTHORITIES

Cases:

Adickes v. *S.H. Kress & Co.*, 398 U.S. 144 7

Garner v. *United States*, 424 U.S. 648 8

Golden State Bottling Co. v. *NLRB*, 414 U.S. 168 8

Herndon v. *Georgia*, 295 U.S. 441 7-8

ILGWU v. *Quality Mfg. Co.*, 420 U.S. 276 7

NLRB v. *Burns International Security Services, Inc.*, 406 U.S. 272 8

NLRB v. *Strong*, 393 U.S. 357 8

NLRB v. *Transcontinental Theaters, Inc.*, 568 F. 2d 125 7

Radio & Television Broadcast Technicians Local Union 1264, IBEW v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255 5

Royal Typewriter Co. v. *NLRB*, 533 F. 2d 1030 6

Page

Cases—Continued:

Southport Petroleum Co. v. *NLRB*,
315 U.S. 100 6

Universal Camera Corp. v. *NLRB*,
340 U.S. 474 6

Wisniewski v. *United States*,
353 U.S. 901 7

Statute:

National Labor Relations Act,
29 U.S.C. 151 *et seq.*:

Section 8(a)(1), 29 U.S.C. 158(a)(1) 4

Section 8(a)(3), 29 U.S.C. 158(a)(3) 4

Secjion 8(a)(5), 29 U.S.C. 158(a)(5) 4

Section 10(e), 29 U.S.C. 160(e) 7

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 18-37) is not yet officially reported. The decision and order of the National Labor Relations Board (Pet. App. 43-66) are reported at 239 N.L.R.B. 179.

JURISDICTION

The judgment of the court of appeals (Pet. App. 38-42) was entered on May 12, 1980. A petition for rehearing was denied on May 22, 1980 (Pet. App. 17). The petition for a writ of certiorari was filed on August 14, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Big Bear Supermarkets operates a chain of supermarkets in San Diego County, all of which for many years have been covered by collective agreements with the Unions (Pet. App. 45).[1] Due to a series of condemnations that drastically reduced the size of its parking area, the Big Bear store at La Mesa suffered a substantial drop in profits (*id.* at 50). Thereafter, Big Bear leased the La Mesa store to Richard Holmes, manager of another Big Bear store and the son of Big Bear's general manager and secretary-treasurer (*id.* at 46). The agreement granted Holmes a franchise to use Big Bear's trade name, trademark, labels, copyrights and services in the operation of the store (*id.* at 94).

Although the agreement provided that Holmes would be an independent contractor with control over labor

---

[1]Retail Clerks Union, Local 1222, Retail Clerks International Association, AFL-CIO, and Amalgamated Meat Cutters Local 229, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO.

relations, the franchise agreement gave Big Bear extensive authority over the operation of the store. Thus, the store was to be operated as part of Big Bear's system of stores, and Big Bear was to provide no less supervision than it provided to its other stores. The store had to carry product lines customarily carried by Big Bear's stores, in quantities determined by Big Bear. No product line could be changed without its permission. Big Bear had sole discretion to contract for advertising and Holmes could purchase additional advertising only with its permission. Holmes was required to sell goods advertised by Big Bear at the advertised prices and honor discount coupons contained in Big Bear's advertisements. If Holmes took any action without Big Bear's permission, where such permission was required by the franchise agreement, the franchise could be canceled. Big Bear actively exercised the right of control that the franchise agreement gave it. (Pet. App. 52-53.) Its supervisors came regularly to the store to direct the store's produce man and head meat-cutter (*id.* at 111).

Under the provisions of the agreement, Big Bear loaned all funds required for the operation of the store. In addition, Big Bear was required to make a weekly payment to Holmes of an amount approximately equal to the salaries of the managers at petitioner's other stores. That amount could not be reduced if the store was unprofitable. Although the store had more than $100,000 worth of inventory when the franchise agreement was executed, Holmes made a down payment of only $2,000. He executed an unsecured promissory note for the remaining value of the inventory, to be repaid out of the store's profits. There was no provision for repayment if the store was unprofitable, or if Holmes, who was suffering from a progressively disabling disease, could not continue running the store. (Pet. App. 54-58.) The La Mesa store was the only Big Bear store subject to such a franchise agreement (*id.* at 46).

There were 12 employees at the La Mesa store before Holmes took over its operation. Except for a part-time janitor not included in either bargaining unit, no employee was retained by Holmes. Subsequently, Big Bear transferred all unit employees to its other stores without giving them the option of seeking continued employment at the La Mesa store, even though the Retail Clerks' contract provided for such an option. Big Bear did not notify the Unions of the transfer of the employees. (Pet. App. 46-47.)

Holmes refused to recognize the Unions as the bargaining representatives of the employees, to apply the terms of Big Bear's contracts with the Unions to the new employees, or to supply the Retail Clerks with the names and addresses of the unit employees. He paid lower wages and extended fewer benefits than those required by the contracts. (Pet. App. 47.)[2]

2. The Board found that the franchise agreement was not a bona fide arm's-length transaction, but rather was a sham designed to enable Big Bear to retain control of the operations of the store without union contracts (Pet. App. 60). The Board relied on "the selection of Richard Holmes, a close relative of high management, as the purported franchisee; the controls retained and exercised by Big Bear over the store's operation; and the economic realities of the arrangement reflected in the franchise agreement whereby Holmes initially invested only $2,000 cash and Big Bear finance[d] the store's operation without charging interest to Holmes * * * " (*id.* at 61). The Board rejected Big Bear's assertion that it entered into the

---

[2]From November 15, 1976, through July 31, 1977, Holmes paid $81,687 in wages and $1,988 in other employee benefits. During the year ending July 31, 1976, Big Bear had paid employees at that store $174,204 in wages and $24,537 in other benefits (Pet. App. 59-60).

franchise arrangement to relieve itself of an unprofitable operation (*id.* at 58). The Board pointed out that the arrangement did not accomplish that purpose since "any true entrepreneurial risk" was borne by Big Bear and not Holmes (*id.* at 58-59). Nor did the arrangement relieve the cause of the decline in profitability—the lack of parking space (*id.* at 59). "What was accomplished through the purported franchising, however, was a drastic reduction in the store's operating costs through avoidance of the application of [Big Bear's] union contracts to the franchised store's employees" (*ibid.*). In finding that Big Bear's "real purpose" was to "oust the Unions from its La Mesa store," the Board also relied on the fact that Big Bear "preemptor[ily] transfer[red] out [the unit employees, thereby] * * * obviat[ing] the possibility that Holmes would be a successor employer obliged, despite even a bona fide franchising, to recognize and bargain with the Unions" (*id.* at 60-61).

In these circumstances, the Board found that Holmes was an alter ego of Big Bear, that Big Bear and Holmes were a single employer under the National Labor Relations Act, and that the La Mesa store continued to be covered by the Union contracts. Big Bear and Holmes violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158 (a)(5) and (1), by refusing to recognize the Unions as the bargaining representatives of the employees at its La Mesa store and by refusing to apply the terms of its contracts with the Unions to those employees. The Board further found that Big Bear violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by transferring employees from the La Mesa store to its other stores because of their union representation (Pet. App. 62-63). To remedy Big Bear's unlawful refusal to apply the collective agreements, the Board ordered that those contracts be applied to the employees at the La Mesa store retroactively to the date of the franchise agreement,

and that such employees be made whole for any losses suffered as a result of Big Bear's prior failure to meet its statutory obligations (*id.* at 64-65).

3. The court of appeals upheld the Board's decision and enforced its order (Pet. App. 19). The court agreed with the Board that the "franchise arrangement was not executed for valid business considerations" (*id.* at 30). The court also agreed that "the financial provisions of the agreement are uncharacteristic of a bona fide transfer of ownership" (*id.* at 31). Finally, while noting that "control over labor relations is ordinarily accorded special significance" in determining single-employer status (*id.* at 32), the court agreed with the Board that in the particular circumstances here that factor was entitled to no weight (*id.* at 32-33):

> It would make little sense to give weight to Holmes's control over labor relations in light of the Board's supportable finding that the purpose of the franchise agreement was the evasion of bargaining obligations; transfer of control over labor relations from Big Bear to Holmes helped to effectuate that improper purpose.

ARGUMENT

1. Petitioner does not contest the well-established criteria for determining single-employer status—interrelation of operations, common management, centralized control of labor relations, and common ownership. See *Radio & Television Broadcast Technicians Local Union 1264, IBEW* v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965). Nor does it challenge the settled rule that an employer may not evade its obligations under the Act by setting up what appears to be a new business, but is actually a disguised continuance of the old one. And it does not dispute the proposition that whether there has been a true change in ownership or

a disguised continuation of the operation of the old owner is a question of fact. See *Southport Petroleum Co.* v. *NLRB*, 315 U.S. 100, 106 (1942). Thus, the only issue in this case is whether substantial evidence supports the Board's finding, sustained by the court of appeals, that the operation of the La Mesa store by Holmes was a disguised continuance of its prior operation by Big Bear. Such an evidentiary issue does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S 474, 480-491 (1951).

In any event, as shown in the statement, the Board's decision is amply supported by the record. Contrary to petitioner's contention (Pet. 9), the decision of the court of appeals does not hold that common ownership is dispositive in determining single-employer status, or that control over labor relations is irrelevant. In the context of this case, it is clear that the court regarded as critical the fact that the franchise agreement was not a bona fide transfer of ownership, but a sham designed to enable petitioner to evade its bargaining obligations. Only in this context does common ownership take on added significance. Likewise, the refusal to give weight to Holmes' control over labor relations must be viewed in light of the finding that such control was transferred as part of the unlawful scheme to rid petitioner of its bargaining obligations; giving conclusive weight to the transfer of control over labor relations in these circumstances would permit petitioner to profit by its own wrong.[3]

Petitioner does not contend that the court of appeals' finding of single-employer status is in conflict with any decision of this Court or any other court of appeals.

---

[3]Moreover, even in cases not involving an alter ego relationship, common control of day-to-day labor relations is not essential to a finding of single-employer status. See *Royal Typewriter Co.* v. *NLRB*, 533 F. 2d 1030, 1043 (8th Cir. 1976), and cases cited therein.

Rather, petitioner argues that the court of appeals failed to follow its own prior decision in *NLRB* v. *Transcontinental Theaters, Inc.*, 568 F. 2d 125 (9th Cir. 1977). However, even if it were true that the decision here created an intra-circuit conflict, that would not warrant review by this Court. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

In any event, the court of appeals, in denying the petition for rehearing, amended its opinion to state that *Transcontinental* was clearly distinguishable from this case because the franchise agreement here was motivated by a desire to avoid petitioner's bargaining obligations while no such improper motivation existed in *Transcontinental* (Pet. App. 36-37).

2. Petitioner's challenge to the propriety of the Board's remedial order (Pet. 9-13) is not properly raised in this Court. Petitioner never presented its objection to the remedial order to the Board. After the Board issued its decision, petitioner did not request that the remedial order be reconsidered on the grounds it now relies on, and it does not suggest any extraordinary circumstances justifying its failure to do so. Accordingly, Section 10(e) of the Act, 29 U.S.C. 160(e), precludes petitioner from raising its objections to the remedial order in this Court. *ILGWU* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975). Moreover, petitioner did not attack the propriety of the Board's remedial order in its brief to the court of appeals. It first raised the issue in its petition for rehearing, which the court denied without commenting on this issue. When issues are neither raised before nor decided by a court of appeals this Court will not ordinarily consider them. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). This Court has also refused to consider questions raised belatedly in a petition for rehearing and not actually decided by the court below. See *Herndon* v.

Georgia, 295 U.S. 441, 443 (1935). Cf. *Garner* v. *United States*, 424 U.S. 648, 656 n.10 (1976) (declining to pass on contentions "not deemed of sufficient merit to warrant discussion below").[4]

---

[4]In any event, petitioner's challenge to the remedy is without merit. This Court's holding in *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272, 281-291 (1972), that a successor is not bound by its predecessor's contract where it has not agreed to assume the obligations under that contract, has never been applied where, as here, the new entity is found to be a disguised continuance of the entity that agreed to the contract and is established for the specific purpose of evading the obligations imposed by that contract. The speculation (Pet. 12) that petitioner might not have agreed to the same contractual terms if it had known that the La Mesa store would be included in the unit is without merit. Petitioner knew, when it negotiated the 1978 contract, that the status of the La Mesa store was being litigated. The potential liability resulting from a decision that the contract applied to that store could have been reflected in petitioner's negotiating position. See generally *Golden State Bottling Co.* v. *NLRB*, 414 U.S 168, 185 (1973). Once the contract was signed, and the Board found that the failure to apply it to the La Mesa store was unlawful, the Board's authority to require petitioner to pay the employees what it would have paid them if it had complied with its statutory obligations is clear. *NLRB* v. *Strong*, 393 U.S. 357, 359-360 (1969).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

DAVID A. FLEISCHER
Attorney
National Labor Relations Board

SEPTEMBER 1980

DOJ-1980-09